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6
7 CIVIL SERVICE COMMISSION

8 CITY OF COLFAX

9 IN RE THE DISCHARGE OF CHIEF RICK
10 MCNANNAY,

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER GRANTING
SUMMARY JUDGMENT

11 APPEARANCES:

12 CHIEF RICK MCNANNAY by

13 DUNN & BLACK,

14 Robert A Dunn, and Alexandria T. Drake, Attorneys at Law

15
16 CITY OF COLFAX, by

17 MAYOR, G. Todd Vanek, and by

18 ETTER, MCMAHON, LAMBERSON, VAN WERT & ORESKOVICH, P.C., per

19 Ronald Van Wert, Attorney at Law

20
21
22 Chief Rick McNannay filed a motion for summary judgment. City of Colfax filed objection to
23 motion for summary judgment. McNannay's motion is Granted.

24
25 ISSUE

26 Whether the City of Colfax's Discharge of Chief Rick McNannay on January 11, 2019 for
27 dishonesty in violation of City of Colfax Civil Service Commission Rules and Regulations 5.02 was for just cause,
28 in good faith and not for political reasons.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING SUMMARY JUDGMENT - 1

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4 I. PROCEEDURAL BACKGROUND

5 1.1 On January 10, 2019 Chief McNannay was handed a letter terminating his employment
6 with the City of Colfax, by Mayor G. Todd Vanek. The letter was dated January 11, 2019.

7 1.2 On January 15, 2019 Chief McNannay Requested an investigation and hearing of his
8 discharge by the City of Colfax.

9 1.3 On January 16, 2019 this commission file an **Acknowledgment of Request for Hearing/**
10 **Investigation for Discharge**, requested a more complete Appeal to be filed by Chief McNannay by February 6,
11 2019, and set a scheduling hearing for discovery, motions and the hearing for March 5, 2019.

12 1.4 On January 17, 2019, a new letter of dismissal was mailed, this one including reference to
13 Section 5.03 of the Colfax Civil Service Rules and Regulations giving Chief McNannay 10 days to request a
14 Hearing before the Civil Service Commission.

15 1.5 On March 5, 2019, at the regularly scheduled Colfax Civil Service Meeting a Scheduling
16 Hearing was held. Discussion was had regarding discovery schedules, discovery cut off dates, pretrial motion dates,
17 exhibits and witness lists, and a hearing date. No objections were made by the City of Colfax at that time, alleging
18 that the Civil Service Commission did not have authority to hear pretrial motions, including summary judgment
19 motions. A Scheduling Order was filed on March 8, 2019, no objection to that Scheduling Order was filed.

20 1.6 On May 9, 2019, Colfax City attorney Ronald Van Wert interviewed Tisha Jones.

21 1.7 On May 17, 2019 the City of Colfax Deposed Chief Rick McNannay.

22 1.8 On May 29, 2019 the City of Colfax, filed a letter in this matter Reinstating Chief Rick
23 McNanny as Chief and demoting him to police officer effective January 17, 2019.

24 1.9 On May 30, 2019, this Chairman sent an email to all parties asking that they be ready to
25 address the issue of whether the City of Colfax still retained jurisdiction to reinstate and demote Chief McNanny and
26 to address discovery issues that had arisen.

1 1.10 On June 3, 2019, the City of Colfax file a letter correcting the May 29th letter of
2 reinstatement to give 14 days' notice of his demotion and pay commensurate with the Chief of Police position
3 through June 12, 2019.

4 1.11 On June 4, 2019 the Colfax Civil Service Commission held it's hearing on discovery
5 issues and the issue of the City's retained jurisdiction to "reinstate" and then demote Chief McNannay. The
6 Commission unanimously agreed that the City lost jurisdiction over Chief McNannay's employment when it fired
7 him on January 11, 2019 and jurisdiction over his employment status was perfected in the Civil Service Commission
8 when Chief McNannay appealed on January 15, 2019, and the Commission accepted the appeal on January 16,
9 2019. Further, that since the dismissal was based upon perjury, and that the City admitted it could not prove the
10 elements of perjury, the question arose as to whether the Commission should simply reinstate Chief McNanny at
11 that time. The City asserted that it could still prove dishonesty, so the trial date was confirmed, and the matter
12 proceeded as scheduled.

13 1.12 Chief McNannay timely filed a Motion for Summary Judgment. The City of Colfax
14 timely filed its objection to the Motion for Summary Judgment. The Motion was heard on July 2, 2019. The time
15 set for pre-trial motions.

16 1.13 City of Colfax, in its Objection to the Motion for Summary Judgment briefed the issue of
17 the Appearance of Fairness Doctrine, without tying it to the Motion for Summary Judgment. When asked about
18 why it was included, The Cities attorney, Ronald Van Wert accused Chairman, Leslie Cloaninger of violating the
19 doctrine. When asked why he had not brought a timely motion on the issue asking for her recusal, he replied that
20 there was no deadline for raising the issue, and he had trouble getting a transcript of the June 4, 2019 hearing in
21 time. After giving Mr. Van Wert a chance to make his argument on Ms. Cloaninger's violating the Appearance of
22 Fairness Doctrine, Ms. Cloaninger asked the other commissioner if she should remove herself from the matter, the
23 remaining commissioners, Rob Aucutt, and Jon Kehne voted no. The Commission also unanimously ruled that a
24 Motion for Commissioner Cloaninger to be removed due to violation of the Appearance of Fairness Doctrine should
25 have been made as a pre-trial motion, giving the opposing side the opportunity to brief the matter, and the
26 Commission the opportunity to cure any defect, and since it wasn't timely brought it would not be considered.

27 1.14 City of Colfax, in its Objection to the Motion for Summary Judgment also asserted that
28 the Civil Service Commission lacked authority and requisite knowledge to hear a Motion for Summary Judgment.

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1 The statute governing Civil Service hearings is RCW 41.12.040(5), and gives the Commission the authority to adopt
2 rules of practice and procedure to conduct hearings. The Colfax Civil Service Commission ruled unanimously that
3 the City should have raised any objection to the type of pre-trial motions it was qualified to hear on at the March 5,
4 2019 Scheduling hearing, its failure to do so waved any objection to the Commission hearing a Summary Judgment
5 Motion timely brought and argued.

6 7 2. FINDINGS OF FACT

8 2.1 On November 30, 2016 Chief Rick McNannay submitted a Notice of Hire (NOH) form
9 for Joseph Handley (hire date 08/01/2016) to Tisha H. Jones, the Certification Manager for the State of Washington
10 Criminal Justice Training Center (CJTC). Chief McNanny submitted a new NOH form that had been developed by
11 CJTC and adopted on November 9, 2016, to include the criminal background, psychological and polygraph testing
12 dates of new hires. The prior NOH form did not require that information.

13 2.2 In 2005 the State of Washington changed the requirements of "lateral" hires requiring
14 every law enforcement agency to conduct criminal background checks, psychological evaluations and polygraph
15 examinations of each hire, part-time or full time, whether the officer is employed full time with another agency or
16 not, even if they are currently certified by the State of Washington as a commissioned peace officer.

17 2.3 Tisha H. Jones testified that many law enforcement agencies in the State of Washington
18 were unaware of this regulation and changed the NOH form on November 9, 2016 to help CJTC identify who was
19 not in compliance. Notice of Hire Forms and Notice of Separation forms are required by the CJTC for more reasons
20 than just showing compliance with RCW 43.101.095 and WAC Chapter 139-07.

21 2.4 The NOH form submitted by Chief McNanny for Joseph Handley correctly identified that
22 Officer Handley had completed his Background Check on 04/30/2015, his psychological examination on
23 04/19/2015, and his polygraph examination on 04/19/2015, but identified his hire date with the City of Colfax was
24 08/01/2016.

25 2.5 The fact that the testing and criminal background check was conducted more than a year
26 prior to the Colfax hire date prompted Ms. Jones to inquire, by email, and telephone to Chief McNanny about the
27 discrepancy. Their testimony regarding the content of their phone calls is consistent and uncontroverted. Chief
28 McNannay readily admitted that he was ignorant about the requirements of RCW 43.101.095 and WAC Chapter
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING SUMMARY JUDGMENT - 4

1 139-07, that he had not actually read the statutes, that the City of Colfax was not in compliance with it. The City of
2 Colfax did not present any evidence that Chief McNannay attempted to deceive Trisha Jones about the City's lack of
3 compliance with RCW 43.101.095 and WAC Chapter 139-07.

4 2.6 Ms. Jones testified, and it is uncontroverted, that Chief McNanny was forthcoming in
5 emails and telephone conversations about his lack of understanding regarding the requirements of RCW
6 43.101.095 and WAC Chapter 139-07, that the City of Colfax had part time officers who did not comply. Ms. Jones
7 testified that she informed Chief McNannay that given the time that had passed since the part-time officers had been
8 hired by the City, and the fact that CJTC could not legally require the City to conduct further examinations for those
9 officers, she directed him to submit an old NOH form (one that did not specify the criminal background,
10 psychological evaluation, and polygraph test dates) for the officers already working for the City and to make sure all
11 new hires satisfied the examination and testing requirements moving forward.

12 2.7 Chief McNannay and former Civil Service Secretary, Connie Ellis, testified, and it is
13 uncontroverted, that it had not been the City of Colfax's practice to require criminal background checks,
14 psychological evaluations or polygraph tests of part time lateral hires, prior to 2016.

15 2.8 All NOH forms are signed under penalty of perjury. It is uncontroverted that Chief
16 McNanny signed the forms. Chief McNannay has also testified that he did not review RCW 43.101.095 and WAC
17 Chapter 139-07, was unaware of the new requirements instituted by the State of Washington in 2005 and was
18 following the hiring practices the City of Colfax had been using for many years prior to his being hired for the Chief
19 of Police position on July 1, 2012. No evidence was presented that Chief McNanny had received notice or training
20 that showed the City of Colfax's hiring processes for part-time lateral police officers was out of compliance with
21 state law. No evidence was presented that Chief McNanny willfully deceived anyone regarding the City of Colfax's
22 hiring process.

23 2.9 Chief McNannay testified, and it is uncontroverted, that he informed his supervisor,
24 Christine Mathis, Finance Director and acting City Administrator of the discussion and statutory requirements by
25 forwarding her the emails with Ms. Jones from 11/30/2016- 12/27/16. He also informed Mayor G. Todd Vanek of
26 the situation on December 13, 2016, using the term "grandfathered" to explain not having to conduct tests on the
27 part-time, lateral officers in question, but making it clear all new lateral, part time hires would have to be tested and
28 checked according to the statutes. Chief McNannay's use of the term "grandfathered" was inartful but does not rise
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1 to the level of being dishonest. There is no evidence that Chief McNannay tried to deceive his supervisors about the
2 content of his conversations with Tisha Jones and the fact that the City of Colfax had failed to comply with RCW
3 43.101.095 and WAC Chapter 139-07.

4 2.10. Beginning in June 2017 Mayor G. Todd Vanek and Chief Rick McNanny began having
5 conflicts on various issues regarding compensation, budgeting, communication with City Counsel, chain of
6 command, Chief McNannay's handling of a suspicious package investigation, and personnel issues with Colfax
7 police officers. Mayor G. Todd Vanek wrote a letter of formal reprimand on December 6, 2017, but never delivered
8 it "on advice of counsel". Mayor G. Todd Vanek wrote a letter on December 26, 2017 discharging Chief
9 McNannay, but never delivered it "on advice of counsel". A draft Performance Evaluation was completed for Chief
10 McNannay by the Mayor for 2017, stating that he failed to meet expectations in 12 of 21 categories, but was never
11 delivered. Mayor G. Todd Vanek prepared a formal reprimand for insubordination on March 5, 2018, but it was
12 never delivered "on advice of counsel". A formal reprimand was prepared by Mayor G. Todd Vanek for Chief
13 McNannay on April 3, 2018 for poor performance, it is unclear if that reprimand was delivered or not. Mayor
14 Vanek's numerous drafts of disciplinary documents for various reasons, and failure to deliver or act, are evidence of
15 his searching for a way to rid himself and the City of Chief McNannay without conforming to the progressive
16 discipline requirements of the Civil Service Code.

17 2.11 On October 16, 2018, verbally, the City of Colfax, by Mayor G. Todd Vanek placed
18 Chief Rick McNannay on Administrative Leave, with pay, for alleged "Unprofessional Conduct". Chief McNannay
19 was denied access to his office and records.

20 2.12 A letter dated October 22, 2018 further stated that Mayor, G. Todd Vanek was initiating
21 an investigation. The letter did not specify what the alleged unprofessional conduct was but stated that that Chief
22 McNannay had been given notice of the general allegation(s). No further evidence was presented that Chief
23 McNannay was given notice of the specific charges he was being investigated for.

24 2.13 On October 24, 2018 Chief McNannay was interviewed by John Young, an investigator
25 for "Clear Risk Solutions" whom the City of Colfax has an insurance pool agreement with. According to the letter
26 head for Clear Risk Solutions they are "Self-Insured Administrators/Risk Managers". John Young, according to
27 the Clear Risk Solutions letter head is and investigator for the "Pre-Litigation Program". Clear Risk Solutions, as
28 the City's insurer, has a financial interest in ensuring the City is not subject to liability. As a "stake holder" in the
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1 controversy they are not “independent” or “unbiased”. However, their lack of independence does not disqualify
2 their report/investigation, lack of independence merely applies to credibility. The report/investigation needs to be
3 judged on its merits.

4 2.14 There is no evidence that John Young was ever informed by the City of Colfax that Chief
5 McNannay had forwarded his 2016 emails with Tisha Jones to his supervisor, Chris Mathis, and had informed
6 Mayor G. Todd Vanek of the NOH problem in 2016.

7 2.15 Chief McNanny has testified, and his testimony is uncontroverted, that he was
8 interviewed by John Young on October 24, 2018 without being informed of the specific allegations against him (i.e.
9 violating RCW 43.101.095, WAC Chapter 139-07, and knowingly and willfully committing perjury and dishonesty
10 by signing NOH forms in 2016) or being given the opportunity to access and review his files in preparation for the
11 interview. Further, it is uncontroverted, that he was interviewed prior to receiving the October 22, 2018 letter from
12 Mayor G. Todd Vanek.

13 2.16 Chief McNannay has testified, and his testimony is uncontroverted, that he informed John
14 Young at the October 24, 2018 interview that he had had communications, both email and by telephone, with Tisha
15 H. Jones, the Certification Manager for the State of Washington Criminal Justice Training Center, in 2016 regarding
16 the NOH forms for the part time officers. It is uncontroverted that Chief McNannay told John Young that he could
17 not remember the hiring process of those officers.

18 2.17 On November 19, 2018 Mayor G. Todd Vanek sent a letter to Chief McNannay
19 informing him of a disciplinary hearing to be had on November 29, 2018 at 10:00a.m. This was the first
20 documented evidence that Chief McNannay was informed that he was being accused of perjury and dishonesty
21 regarding the 2016 NOH forms he signed.

22 2.18 The record reflects that Tisha H. Jones informed the City of Colfax, by email on
23 November 26, 2018 that she had directed Chief McNannay to submit the older Notice of Hire forms, that did not
24 include the date of the Criminal Background check, Polygraph and Psychological evaluations on it.

25 2.19 In a letter / report by John Young, to mayor Vanek dated November 12, 2018, and again
26 dated December 19, 2018, he provides that he was requested to investigate “...concerns that Colfax Police Chief
27 Rick McNannay hired several officers to work for the City of Colfax without conducting the required background
28 check, psychological examination, and polygraph examination”. Specifically that Chief McNannay hired four part
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1 time police officers, Joseph Handley (hire date: 08/01/16), Steven Perez (hire date: 09/01/16), Jacob Spitzer (hire
2 date: 01/19/16), and Shane Emerson (no hire date given) without conducting a background investigation , including
3 a check of criminal history, a psychological examination, and a polygraph examination as required by RCW
4 43.101.095 and WAC Chapter 139-07. Mr. Young does not address whether he gave Chief McNannay specific
5 notice of the charges of perjury and was dishonesty, what the City of Colfax's previous hiring practices where,
6 when the law changed regarding hiring practices for lateral hires, what training was provided or required by the
7 City to ensure its employment practices conformed with State law, and whether Chief McNanny was willfully
8 breaking the law, or simply ignorant of its requirements. His conclusory statement that Chief McNanny "knew or
9 should have known" about the requirements of RCW 43.101.095 and WAC Chapter 139-07, do not prove
10 dishonesty but is a legal term of art used to describe negligence.

11 2.20 A "Loudermill" disciplinary hearing was held on November 29, 2018, starting at 10:00
12 a.m. Chief McNannay was not allowed access to his records prior to the hearing. Chief McNannay was only
13 permitted to review a copy of John Young's November 12, 2018 letter/report prior to the hearing beginning. No
14 evidence was provided the Commission on how much time he had to review the letter/report. He was not permitted
15 to copy or retain the report in any way. Chief McNannay presented Tisha Jones' November 26, 2018 email to the
16 city attorney, Mr. Van Wert, during the hearing. It had not been given to him by the City of Colfax. It was then
17 determined by Mr. Van Wert, counsel for the City of Colfax, that its investigator John Young should receive a copy
18 of the email.

19 2.21 Mr. Young did receive the November 26, 2018 email from Tisha Jones. In his letter/
20 report of December 19, 2018 John Young does reference her clarification of her direction to Chief McNannay to
21 sign the old NOH forms, stating that she appeared to recant some of her previous information. However, he did not
22 interview Tisha Jones to clarify the sequence of events, or the truthfulness of Chief McNannay's representations to
23 her, or whether she required a NOH form to be filed despite the City's lack of compliance with RCW 43.101.095
24 and WAC chapter 139-07. The City of Colfax did not direct John Young to interview Tisha Jones. Counsel Ron
25 Van Wert at the July 2nd hearing on the Motion for Summary Judgment contended that the City had no obligation to
26 "investigate it's investigator" or insure that a thorough investigation had been completed, even though the City was
27 on notice through Tisha Jones' November 26, 2018 email that Chief McNannay had been honest with her about the
28 City's lack of compliance, and his lack of understanding of RCW 43.101.095 and WAC Chapter 139-07, and that
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she had directed him to sign the old NOH forms, as Notice of Hire and Notice of Separation forms were still required by CJTC to be filed whether or not the agency involved had complied with the above statutes.

2.22 John Young states in his December 19, 2018 letter/report that he “found it troubling that Chief McNannay told me he could not recall whether he had conducted background checks, including polygraphs and psych evals on his officers”. The City of Colfax rely on this statement by John Young to prove dishonesty on Chief McNannay’s part and presented no further evidence of dishonesty on the issue.

2.23 Chief McNannay's statements to John Young on October 24, 2018 regarding hiring practices in 2016 were transcribed and are not controverted and read as follows: *I'm gonna just jump straight to the chase. I made some mistakes, yes I did. I'm not gonna lie to you. ... My profession isn't about lying my-I-I have more integrity than that, but I'm also not going to admit to something, I'm not gonna say I did something if I wasn't sure. ... I'm not trying to beat around the bush, I'm not trying to jerk you around, but you know if the documents on there- some people I did, some people I didn't. I don't recall.* Exhibit Z to Motion for Summary Judgment (McNannay Clear Risk Interview Transcript, pp 12-13). These statements were given by Chief McNannay without the benefit of being able to review his records or being given specific notice of the charges against him, fundamental due process procedures were not followed.

2.23 At the hearing on the Motion for Summary Judgment the City attorney, Ron Van Wert, agreed that the only issue before the Commission was whether the City's discharge of Chief McNannay for the stated reason of dishonesty regarding the 2016 NOH forms was for just cause, in good faith, and not for political reasons.

3. CONCLUSIONS OF LAW

3.1 This matter is governed by RCW 41.12.090 and Colfax Civil Service Commission Rules and Regulations 5.10. The City of Colfax Civil Service Rules and Regulations raise the standard from “cause” as enumerated in RCW 41.12.090 to “just cause”.

3.2 The term “Just Cause” is a higher standard than “Cause” in labor law and requires the employers discharge of an employee to be supported by substantial evidence, reasonably believed by the employer to be true. Baldwin V. sisters of Providence in Washington, Inc., 112 Wn.2d 127, 139 (1989). “Just Cause”

requires procedural fairness and appropriateness of the penalty. Civil Service Comm'n of City of Kelso V. City of Kelso, 137 Wn. 2d 166, 173 (1999).

3.3 The City of Colfax violated the requirement of procedural fairness by not giving Chief McNannay notice of the specific charges against him prior to his being interviewed by John Young.

3.4 The City of Colfax violated the requirement of procedural fairness by not giving Chief McNannay a meaningful opportunity to review John Young's letter/report and giving him meaningful access to his business records prior to the "Loudermill" hearing.

3.5 The City of Colfax did not act in good faith, when it did not require its investigator to conduct a thorough investigation by interviewing a material witness, Tisha Jones, prior to taking action to discharge Chief McNanny. The lack of interviewing a material witness means they could not have had the information needed to have reasonably believed Chief McNanny willfully was deceitful and dishonest with that witness. The City of Colfax cannot convincingly argue now that they acted in "good faith" on the knowledge they had at the time, when they willfully did not follow up on mitigating/exculpatory evidence, as required by the just cause standard, prior to their taking the action to discharge Chief McNannay.

3.6 No evidence has been provided, let alone substantial evidence, that Chief McNannay was dishonest with Tisha Jones, Chris Mathis or G. Todd Vanek regarding the cities lack of compliance and his lack of understanding of the requirements of RCW 43.101.095 and WAC Chapter 139-07.

3.7 Chief McNannay truthfully filled out the NOH form adopted by CJTC on November 9, 2019, showing that the required testing and background checks were done a year before the Officer's hire date. He was completely honest with Tisha Jones about his lack of understanding, lack of training, the City of Colfax's outdated hiring practices, and his own negligence in not researching the requirements of RCW 43.101.095 and WAC Chapter 139-07.

3.8 Dishonesty does not include inadvertence or ordinary negligence, good faith errors in judgment, unsatisfactory conduct, or failure to perform.

3.9 No evidence has been presented to this Commission that Chief McNannay acted with a lack of honesty or integrity or with a disposition to defraud or deceive regarding the NOH forms he signed in 2016.

3.10 Discharge, and public accusations of perjury and dishonesty were not appropriate disciplinary action for the negligent act of not keeping up with the State of Washington's complicated hiring

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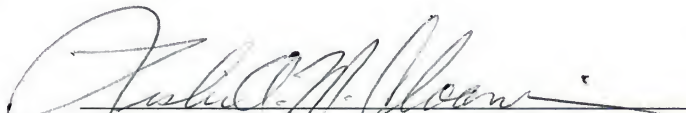
1 requirements. It is unclear who was more negligent; the City of Colfax for not requiring and paying for continuing
2 education, or Chief McNannay for not pursuing continuing education.

3 3.11 Mayor G. Todd Vanek's written record of attempting to find a basis to discharge or
4 demote Chief McNannay for a year prior to his actual discharge, the City's willful failure to complete a thorough
5 and fair investigation, and the City's failure to afford Chief McNannay with procedural due process are convincing
6 evidence of political reason for the discharge.

7
8 ORDER

9 Chief Rick McNannay is reinstated as Chief of Police for the City of Colfax effective January 10,
10 2019 with full back pay and benefits.

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13 Dated this _31st_ of July, 2019.

14
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16 Leslie A. M. Cloaninger, Chairman, Colfax Civil
Service Commission

17
18 /s/ approved Rob Aucutt
19 Rob Aucutt, Commissioner, Colfax Civil Service
Commission

20
21 /s/ approved Jon Kehne
22 Jon Kehne, Commissioner, Colfax Civil Service
Commission